MOTION FILED
JUN 19 1981

No. 80-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

and

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PETER G. NASH
Counsel of Record

MICHAEL A. TAYLOR
OGLETREE, DEAKINS, NASH, SMOAK AND STEWART
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-0855

Counsel for the Associated General Contractors of America

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Associated General Contractors of America, Inc. ("AGC") respectfully moves this Court, pursuant to Supreme Court, Rule 36(1), for leave to file the accompanying brief in this case as *amicus curiae* in support of the petition for certiorari. In support of this motion, AGC shows as follows:

1. This motion is necessitated by the refusal of the International Union of Operating Engineers, Local No. 701, to consent to the filing of a brief by AGC as *amicus curiae,* notwithstanding that the Government by the Solicitor General, has provided his written consent to the filing.

2. AGC is a national trade association consisting of 113 state and local chapters and representing 30,000 firms, including approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities.

3. The AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes rendering assistance to courts in their deliberations on significant decisions concerning labor-management relations in the construction industry, including the filing of a brief *amicus curiae* with the Ninth Circuit in the case now before this Court.

4. The specific question presented by this case is whether the partial *en banc* panel of the Court of Appeals for the Ninth Circuit erred in concluding that the construction industry proviso to Section 8(e) of the National Labor Relations Act (29 U.S.C. §158 (e)) protects any restrictive subcontractor clause agreed to in a "collective bargaining relationship" notwithstanding that the clause allows substantial top-down organizing without avoiding jobsite friction between union and non-union workers.

The resolution of this question by this Court is particularly vital to the AGC and its members. The employees of many AGC members are represented by building and construction trades unions who constantly seek agreement upon restrictive subcontracting clauses. Indeed, almost all such restrictive subcontracting clauses in the construction industry are sought by unions from general contractors, rather than from subcontractors, and AGC's general contractor members number approximately 80% of the construction general contractors in the country. Accordingly, no prospective *amicus* can be more directly affected by this issue than the AGC.

Further, AGC and its members are vitally concerned that the legality of such restrictive subcontracting clauses be settled by this Court. Until this Court rules, general contractor members of AGC throughout the country will be confronted by union demands, often supported by strike action, to agree to subcontracting terms which not only may violate Section 8(e) of the National Labor Relations Act, but also may subject those contractors to triple damage antitrust liability. *See Connell Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616 (1975).

The resulting disruption of collective bargaining and of the business of construction, as well as the untenable dilemma faced primarily by AGC general contractors, has prompted this request to file a brief *amicus curiae* urging this Court to grant the instant Petition for Certiorari. AGC respectfully submits that it is in a unique position to present argument and analysis on behalf of the construction industry in assisting this Court in its consideration of the pending Petition for Certiorari.

WHEREFORE, it is respectfully moved and requested that the AGC be granted leave to file the accompanying brief as *amicus curiae*

Respectfully submitted,

PETER G. NASH
MICHAEL A. TAYLOR
OGLETREE, DEAKINS, NASH, SMOAK AND STEWART
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-0855

Counsel for amicus curiae

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the petition filed in No. 80-1808 for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 17, 1981.

INTEREST OF THE *AMICUS CURIAE*

A statement describing AGC and its interest in this case is set forth in the preceding motion requesting leave to file this *amicus curiae* brief.

REASONS FOR GRANTING THE WRIT

A. Failure To Review The Important Issues In This Case Now Will Result In Significant And Irreparable Disruption In The Construction Industry.

The importance of this case and the need for prompt review of the Ninth Circuit's decision by this Court cannot be overstated. No one, including the Ninth Circuit, the National Labor Relations Board, nor any of the other parties to this litigation claims that this is not an important labor case.[1] Further, in light of this Court's decision in *Connell Construction Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616 (1975), this is also a case with critical implications in the field of antitrust law.

It is evident from the filing of this *amicus* brief in support of a petition for certiorari, that the AGC believes that the Ninth Circuit wrongly decided this case. That conviction flows from the fact that the Ninth Circuit's decision, supporting a decision of the National Labor Relations Board, allows the use of restrictive subcontracting clauses[2] for massive top-down organizing

[1] The Board devoted an entire day to permit the various interested parties in four related cases to orally argue the legalities and practical ramifications of the controversial issues involved in this case. In addition, the majority opinion of the Court of Appeals at the beginning of its *en banc* decision specifically noted the importance of the issue. *Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, _____ F.2d _____, 107 LRRM 2065, 2066 (9th Cir. 1981).

[2] Although restrictive subcontracting clauses in the construction industry vary from one labor-management agreement to another, the kind of clauses involved in this cases have a common theme: they commit the general construction contractor to subcontract no on-site construction work to any subcontractor unless that subcontractor's employees are covered by a union contract. Such clauses are normally called "union signatory" clauses, and violate Section 8(e) of the National Labor Relations Act (29 U.S.C. §158(e)) unless they meet the requirements of the so-called "construction industry proviso" in Section 8(e). *Pacific Northwest Chapter of ABC* v.

by construction unions in direct conflict with this Court's reasoning in its *Connell* decision.[3] Given the massive top-down organizing potential of such clauses under the Ninth Circuit's and NLRB's decisions (discussed more fully below), it is likely that this court will some day reverse the Ninth Circuit's decision in this case. The question before the Court today, however, is whether the Court should decide that issue now in this case or wait and decide it at some future date.

It is the AGC's position that the Court should grant the instant petition for certiorari and decide this issue now. Substantial dislocations within the construction industry will result if the Court defers to another day a decision on this important issue. Thus, supported by the Ninth Circuit's decision in this case,[4] it is reasonable to anticipate that construction unions nationwide will seek these restrictive subcontracting agreements in futherance of their attempts to "top-down" organize construction workers. If those bargaining efforts include strikes or picket lines to obtain such agreements, which is likely

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N.L.R.B., _____ F.2d _____, 107 LRRM 2065, 2069 (9th Cir. 1981). Whether or not the *proviso* requirements are met depends upon how this Court's decision in *Connell* is read and interpreted — and that is the issue in the instant case.

[3] "Top-down organizing" is a term which generally describes union efforts to gain new members by requiring an employer to recognize the union as the representative of his employees, thereby unionizing those employees without the need for the union to organize them directly. Restrictive subcontracting clauses have this "top-down organizing" effect because they require that all subcontractor-employers recognize a union as the representative of their employees.

[4] The District of Columbia Court of Appeals has come to a similar conclusion. *Donald Shriver, Inc.* v. *N.L.R.B.*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, _____ U.S. _____, 49 U.S.L.W. 3825 (1981).

given their great potential for organizing nonunion workers,[5] construction contractors will be confronted with an impossible choice — sign an agreement containing what may be an antitrust violative, restrictive subcontracting clause, or suffer the consequences of a ruinous strike. No other viable options are available. Thus, a contractor may file unfair labor practice charges with the NLRB alleging a violation of Section 8(b)(4)(A) (29 U.S.C. §158(b)(4)(A)) and request that an injunction against such picketing or strike activity be sought pursuant to Section 10(1) of the National Labor Relations Act. (29 U.S.C. §160(1)). However, as the NLRB has already found such agreements to be lawful, the Board's General Counsel will decline to issue a complaint or to seek an injunction against the continuing strike or picketing activity.[6] Nor does it appear that a contractor, confronted with such a strike or picketing, may commence a declaratory judgment action under the antitrust laws and seek injunctive relief to stop such picketing or strikes.[7] Thus, the contractor's options are

[5] The *Connell* case itself involved a picket line to obtain such a clause.

[6] Indeed, it was the failure of the NLRB's General Counsel to issue complaints alleging violations of Sections 8(b)(4)(A) and 8(e) which resulted in the *Connell* case coming to this Court as an antitrust action rather than as a labor case. *See Connell, supra,* 421 U.S. at 631 n.10 (There the Court discussed the General Counsel's so-called *Hagler Memorandum* in which the General Counsel had refused to issue complaints alleging 8(e) violations).

[7] This Court in the recent case of *M.A. Artists & Associates Inc., et al.* v. *Actors Equity Association et al.*, _____ U.S. _____ (issued May 26, 1981), 107 LRRM 2394, reaffirmed the principle that the Norris-LaGuardia Act precludes federal courts from granting injunctions in the context of labor disputes notwithstanding the claim of an unlawful combination or conspiracy. In *Milkwagon Drivers Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 103 (1940) this Court stated: "For us to hold, in the face of [the Norris-LaGuardia Act], that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would

either to sustain a strike, which may well jeopardize the contractor's ability to stay in business, or sign an agreement which includes an illegal subcontracting clause.[8] If the contractor wishes to remain in business and, thus, agrees to the clause, it has but two options. The contractor may simply abide by that subcontracting clause and await triple damage antitrust actions by nonunion subcontractors who have been contractually excluded from the contractor's construction jobs,[9] or it may commence an antitrust action, as did *Connell*,

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run counter to the plain mandate of the Act and would reverse the declared purpose of Congress." *See also Utilities Services Engineering, Inc.* v. *Colorado Building & Construction Trades Council*, 549 F.2d 173 (10th Cir. 1977).

[8] In view of the Board's expansive reading of the construction industry *proviso*, unions have the present right to insist on the inclusion in a collective bargaining agreement of such a subcontracting clause, because the Board treats such a clause as a mandatory subject of bargaining. *See e.g., International Hod Carriers, Local 1082 (E.L. Boggs Plastering Co.)*, 150 NLRB 1958 (1963), *enf'd*, 384 F.2d 55 (9th Cir. 1967) *cert. denied*, 390 U.S. 920 (1968) (No violation of Section 8(b)(3) (29 U.S.C. §158(b)(3)) of the NLRA by union striking to obtain a subcontracting clause permitted by the construction proviso).

Further, although serious question exists as to whether the NLRB and circuit courts have correctly interpreted the Act, the present law is that construction unions may strike and picket to obtain lawful 8(e) proviso clauses despite legislative history indicating that Congress intended to privilege only voluntary restrictive subcontracting agreements. This Court could substantially assist contractors in avoiding the dilemma outlined in the text above, if it also grants certiorari in the companion to this case, *Woelke & Romero Framing, Inc.* v. *N.L.R.B.*, No. 80-1798, and determines that unions may not use economic pressure to support their demands for even lawful 8(e) construction proviso clauses. See the excellent *amicus curiae* brief of the Chamber of Commerce of the United States of America in support of the petition for certiorari in No. 80-1798.

[9] The filing of such suits have been an all too frequent occurrence in recent years. *See e.g., Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Building and Construction Trades Council*, 609 F.2d

seeking to enjoin the operation of the illegal subcontracting clause.[10] However, at least in the Ninth and District of Columbia Circuits, the contractors' declaratory judgment action will now fail, given the agreement by those two Circuits with the NLRB's erroneous interpretation of this Court's *Connell* decision. Accordingly, contractors will be subjected to

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1368 (3rd Cir. 1979); *Consolidated Express, Inc.* v. *New York Shipping Association, Inc.*, 602 F.2d 494, 511 (3rd Cir. 1979), *vacated on other grounds*, _____ U.S. _____, 100 S.Ct. 3040, 65 L.Ed.2d 1131 (1980); *Commerce Tankers Corp.* v. *National Maritime Union of America*, 553 F.2d 793, 801 (2d Cir. 1977), *cert. denied*, 434 U.S. 923 (1977); *James Julian, Inc.* v. *Raytheon Company*, 499 F.Supp. 949 (D.Del. 1980); *Landscape Specialties, Inc.* v. *Laborers' International union*, 477 F.Supp. 17 (C.D.Ca. 1979).

[10] The general contractor does not have a realistic option to simply ignore the unlawful clause and subcontract his work to non-union firms, for he could be liable to union members for an amount equivalent to the wages and fringe benefits which would have been earned by them had the work been subcontracted to union firms. Such claims are enforceable by means of a "Section 301" suit (29 U.S.C. §185) to confirm a favorable arbitration award rendered on behalf of the Union. *See, Orange Belt District Council of Painters* v. *Maloney Specialties, Inc.*, _____ F.Supp. _____, 98 LRRM 3191 (C.D.Ca. 1978), *affirmed*, 639 F.2d 487 (9th Cir. 1980); *In re Bullard Contracting Corporation*, 464 F.Supp. 312 (W.D.N.Y. 1979). The standard of review by federal courts of arbitration awards is narrow and the interpretation of labor arbitrators will not be disturbed so long as they do not manifest an infidelity to the agreement. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Alyeska Pipeline Service Co.* v. *International Brotherhood of Teamsters*, 557 F.2d 1263, 1267 (9th Cir. 1977). In addition, the contractor will not be permitted to raise the defense of the illegality of the clause in a Section 301 action because a majority of circuit courts will require that any such challenge to the subcontracting provision be initially made in an unfair labor practice proceeding before the NLRB. *See Orange Belt District Council, supra* at 2187; *Waggoner* v. *McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979); *Mullins* v. *Kaiser Steel Corp.*, _____ F.2d _____, 105 LRRM 2579 (D.C. Cir. 1980); *Huge* v. *Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978), *cert. denied*, 442 U.S. 918 (1979).

antitrust suits and potential damages running into the billions of dollars. For many contractors, that will simply mean bankruptcy. In addition, most construction contracts require the posting of bonds by contractors.[11] But contractors faced with potential massive antitrust and Section 301 liability may find it difficult, if not impossible, to obtain such bonding, with the result that many will be effectively forced out of business simply by reason of pending antitrust actions.

Thus, the AGC, an organization representing major general contractors throughout the country, respectfully urges that this Court grant the pending petition for certiorari in this case and decide the issue now. Even if this Court ultimately sustains the Ninth Circuit's decision in this case, a prospect we deem unlikely, it will have done a great service to the construction industry for it will have eliminated the uncertainty which now exists and the very real concern of construction contractors throughout the country that restrictive subcontracting clauses, similar to those involved in this case, may subject them to possible ruinous antitrust damages.[12]

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[11] *See e.g.*, 41 C.F.R. §§1.10.104.1 and 1.10.105.1 (requiring performance and payment bonds on all federal construction contracts in excess of $25,000).

[12] The confusion of contractors and their legal advisors when confronted with union demands for broad subcontracting clauses is readily understandable. First, commentators in the field of labor and antitrust law have expressed widely divergent views on the impact of the *Connell* decision on subcontracting clauses which attempt to embrace situations where union employees are not found to work alongside nonunion employees. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 26 Va.L.Rev. 603 at 619; Janofsky & May, *Connell — Consistent with Past, Indicative of Future*, Proceedings of NYU, Twenty-ninth Annual Conference on Labor; 21-22 (1976); Nash, *Connell "Hot Cargo" Agreements: The Supreme Court as Interpreted by the N.L.R.B.*, 83 Dickinson L.Rev. 661 (1979). Second, the NLRB General Counsel interpreted

In sum, great harm will be done to construction contractors and particularly general contractors nationwide if the Court waits to decide the issues presented in this case. Accordingly, we respectfully request that the Court decide them now.

B. The Ninth Circuit's Decision Legalizes The Use Of Restrictive Subcontracting Agreements As Massive Top-Down Organizing Weapons Of Construction Unions In Direct Violation Of Congressional Intent As Interpreted By This Court In Its *Connell* Decision.

This Court, in its *Connell* decision, characterized restrictive subcontracting clauses in the construction industry as tools for "top-down" organizing that are used in an effort to force union recognition by construction subcontractors.[13] This Court went on to find that the Congress had intended to limit the "top-down" organizing effects of such subcontracting clauses and accordingly, that such clauses were to be lawful under the Section 8(e) construction proviso only in limited circumstances.

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this Court's *Connell* decision in a manner radically different from the NLRB's and circuit courts' decisions in this and companion cases. *NLRB General Counsel's Memorandum on Connell*, 1976 Lab. Rel. Yearbook 295 (BNA, 1977). Moreover, numerous lower courts have differed in their approach to the underlying issue. Thus, several district courts have found that subcontracting clauses which were not restricted to eliminating jobsite friction between union and non-union workers on a specific job are not protected by the construction proviso. *Squillacote* v. *Racine Building & Construction Trades Council, AFL-CIO*, 483 F.Supp. 1218 (E.D.Wis. 1980); *James Julian, Inc.* v. *Raytheon Company, supra; Long* v. *Floorcraft Carpet Co.*, (not officially reported) 95 LRRM 3143 (D.Ore. 1977); *Long* v. *Pam's Carpet Service Inc.*, (not officially reported) 95 LRRM 3145 (D.Ore. 1977); *Operating Engineers* v. *Neilsen & Co.*, (not officially reported) 92 LRRM 2861 (D.Id. 1975). Compare, *Signatory Negotiating Committee* v. *Operating Engineers Local 9*, 447 F.Supp. 1384 (D.Colo. 1978).

[13] 421 U.S. at 625.

This Court then set forth at least three requirements which must be met in order for a restrictive subcontracting clause to be lawful under the Section 8(e) proviso.[14] First, the Court required that such a clause be negotiated within the context of a collective bargaining relationship between the general contractor and the union seeking the clause. Second, the clause's restriction on subcontracting had to be limited to a single jobsite, not only in the sense that it must cover a specific job but also that the clause not require that any subcontractor be signatory to a union contract on other than that specific jobsite.[15]

Third, and finally, the subcontracting clause must meet the basic purpose underlying the construction industry proviso to Section 8(e). That purpose, as stated by this Court in *Connell* and by the NLRB in subsequent decisions, was a "desire to prevent potential union strife between union and nonunion personnel working at the same jobsite."[16] That purpose could be met only if the restrictive subcontracting clause applied on a job where the contracting union's members were to be working and required that all employees working at the jobsite be union represented. Further, that purpose could be met if the restrictive subcontracting clause prohibited

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[14] For a more detailed analysis of these three requirements, see Nash, *Connell "Hot Cargo" Agreements, supra,* n.12.

[15] Accordingly, the restrictive subcontracting clause could not require that a subcontractor be signatory to a union agreement covering all jobs on which he works but may require only that that subcontractor be a union signatory on the specific job covered by the restrictive subcontracting agreement.

[16] Just this past year, the NLRB in *Joint Council of Teamsters No. 42, et al. (Associated General Contractors of California, Inc.),* 248 NLRB 808 (1980), restated its often expressed view that the primary purpose of the construction industry proviso was "to avoid tensions among groups of employees at the same site." *Id.* at 815.

subcontracting of on-site work to nonunion employees and there was no need for the clause to specify any particular union or unions with whom the subcontractor must have a relationship. Indeed, to allow the specification of particular unions would not only severely impinge upon the right of employees to select or reject unionism generally (a restriction of employee rights which always exists when even a valid restrictive subcontracting clause is in effect) but also eliminates the right of employees to select which union they wish to represent them — a restriction totally at odds with the basic purposes of the National Labor Relations Act and unnecessary to meet the basic purpose of the 8(e) construction industry proviso.

As shown by the analysis which follows *all* three of these requirements must be met in order for a restrictive subcontracting clause to be valid under the Section 8(e) proviso. Indeed, only a clause meeting all of these requirements will both fulfill the purpose of the 8(e) proviso, and, at the same time, accomodate Congress' concern that such clauses not be used as massive top-down organizing techniques which unduly and unnecessarily impinge upon the rights of employees to select whether or not they wish to be represented by a labor organization. The following example is illustrative:

Assume the Laborers Union has a collective bargaining relationship with a general contractor and obtains agreement upon a clause restricting subcontracting on one particular job where Laborers Union members will be working to subcontractors who have union contracts. Assume that five subcontractors are hired by the general contractor and all of those subcontractors sign collective bargaining agreements with unions. The original restrictive subcontracting clause

would be lawful for it was bargained as part of a collective bargaining agreement, it related only to a particular job, and it met the purpose of the Section 8(e) proviso by protecting unionized laborers who would be working on that job from having to work alongside any nonunion labor. In addition, however, the restrictive subcontracting clause in this hypothetical could not be used as a massive organizing weapon. Each of the subcontractors on the job were required to sign a union contract covering only that job. The restrictive subcontracting clause in this hypothetical did not require that those subcontractors sign an agreement with any particular union, thereby leaving the employees of these subcontractors some choice regarding which union they wished to represent them. The net result is that, at most, five employee units of nonunion subcontractors would be covered by union agreements, with the employees having a choice of representative.

On the other hand, the NLRB[17] as well as the District of Columbia and Ninth Circuits[18] have interpreted this Court's *Connell* decision differently, and, in doing so, have sanctioned the use of restrictive subcontracting clauses for massive top-down organizing purposes. Thus, the Board and Circuits have concluded that a restrictive subcontracting clause is valid if it *either* arises from a collective bargaining relationship *or* it meets the basic purpose of the Section 8(e) proviso. Further, the Board and Circuits have concluded that a restrictive subcontracting clause remains valid even

[17] *Woelke & Romero Framing, Inc.*, v. *N.L.R.B.*, _____ F.2d _____, 107 LRRM 2065, 2066 (9th Cir. 1981); *Utilities Services Engineering, Inc.*, 239 NLRB 253 (1978); *Sullivan-Kelley Associates*, 239 NLRB 264 (1978); *Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, *supra*.

[18] *Donald Schriver, Inc.* v. *N.L.R.B.*, *supra*; *Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, *supra*.

though it restricts subcontracting to employers signatory to agreements with specific unions (e.g. "AFL-CIO Affiliated Unions"). Finally, both the Board and the Circuit Courts have concluded that such an agreement need not be related to a specific jobsite but may cover multiple jobsites as long as it arises out of a collective bargaining relationship *or* is intended to eliminate jobsite friction which may result from union employees being required to working alongside nonunion employees.

In sum, these two Circuit Courts and the Board have sanctioned the use of restrictive subcontracting agreements as massive top-down organizing weapons. The following example illustrates the potential effects of these decisions. Assume, as above, that the Laborers Union has a bargaining relationship with a general contractor and obtains an agreement restricting subcontracting only to firms who have AFL-CIO agreements covering all of their jobs. Assume that the general contractor is performing five jobs and employs five different subcontractors on each job. Because the restrictive subcontracting clause in question arises from a collective bargaining relationship and because the Board and Circuits have concluded that this standard alone is enough to privilege such an agreement, each of the 25 subcontractors will be required to sign AFL-CIO contracts that cover not only their work on the job being performed for this general contractor, but which covers all of their other work as well. Assume further that these 25 subcontractors are working on two other jobs each and that the union with whom each has an agreement seeks from each of the 50 general contractors an agreement restricting all work on those jobs to only AFL-CIO firms in order to protect their union members from having to work alongside nonunion labor on those jobs. If each of those 50 jobs employed four other subcontractors, then 250 more collective bargaining units (including only one

each for each of the general contractors) would be required to be unionized. And that result would be lawful under the Board's and Circuits' decisions because the unions involved, although having no collective bargaining relationships with the 50 general contractors, would meet the alternative requirement for legality — an agreement to protect their members from being required to work alongside nonunion members. Accordingly, the potential effect of one restrictive subcontracting agreement negotiated with one general contractor is the unionization of 325 units of employees, all by AFL-CIO unions.[19]

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[19] The 325 units referred to in the hypothetical above include the initial 25 subcontracting units on the general contractor's jobs, the other 50 units of those subcontractors employed on other jobs, the 50 general contractors whose employees will be required to be covered by AFL-CIO contracts, and the additional 200 subcontractors working for those general contractors whose firms will be required to sign agreements with the AFL-CIO unions.

These hypothetical figures do not, of course represent reality. Rather they are used merely to compare the relative top-down organizing potential of two different interpretations of this Court's *Connell* decision. Thus, for example, if the Board and Circuits are correct and an 8(e) proviso clause need not be limited to a specific job site, then many (if not most) restrictive subcontracting clauses will be negotiated with multi-employer associations, and will bind many general contractors, not just one. Indeed, that is what happened in the instant case. See *Operating Engineers, Local 701*, 239 NLRB 274, 275 (1978) *enforced sub nom Pacific Northwest Chapter of ABC* v. *N.L.R.B.*, _____ F.2d _____, 107 LRRM 2065 (9th Cir. 1981). Accordingly, the top-down organizing potential of such clauses will be substantially broadened. On the other hand, it is likely that each subcontractor in an area will be working on more than one job for a single general contractor, or that two or more subcontractors on one job will also be working side-by-side on other jobs. Thus, the top-down organizing potential of a single restrictive subcontracting clause with one general contractor will not be as great, as a practical matter, as the potential set forth in the text above.

CONCLUSION

In sum, the decision of the Ninth Circuit presented in this case for review could not possibly endure under this Court's analysis of Congress' desire to limit top-down organizing in the construction industry by the use of restrictive subcontracting clauses. The Ninth Circuit's decision, as long as it is allowed to stand, can result in disastrous labor and antitrust consequences for construction industry employers, particularly constuction industry general contractors. Further, thousands of non-union employees in the construction industry throughout the country may be subjected to union representation which they do not desire.

Based on the foregoing, The Associated General Contractors of America, Inc. respectfully submits that the petition for writ of certiorari in this case should be granted to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

PETER G. NASH
Counsel of Record

MICHAEL A. TAYLOR
OGLETREE, DEAKINS, NASH, SMOAK AND STEWART
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-0855

Counsel for The Associated General Contractors of America, Inc.